BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

A Debtor Does Not Have The Legal Right To Be Adjudicated Bankrupt Under Section 75(s) After Expiration of a Voluntary Extension

In its opinion the Circuit Court of Appeals, Ninth Circuit, states the major question in the following language:

> "The question of chief concern herein is whether, the term of an extension plan formulated under §75 (a-r) having expired and leave to sell the farmer-debtor's lands under deeds of trust having been granted, the district court sitting in bankruptcy has jurisdiction over the lands for the purposes of §75(s) proceedings." (TR.-178)

The Court then makes the following statement pertaining to a case decided by it in 1941, in which this Court denied certiorari on May 26, 1941:

> "In *Cohan* v. *Elder*, 118 Fed. 2d 850, 851 (C.C.A. 9, 1941), this court declared that by subsection (s) Congress 'Provided for an adjudication on petition of the aggrieved debtor notwithstanding the acceptance and confirmation of his own proposal.' In the Cohan case the debtor had filed his amended petition under §75(s) after the acceptance and confirmation of the extension proposal *but before the expiration of its term*.* However, in holding the debtor entitled to file an amended petition, the court emphasized the necessity for aggrievedness on the part of the debtor and considered the time element unimportant." (TR.-178)

This statement by the court shows that the question presented in the instant case was not before the court in the Cohan case, and, therefore, the statement that in the Cohan case the court "considered the time element unimportant" is wholly irrelevant. The Circuit Court further said:

> "The language of §75(s) does not limit its benefits to an aggrieved debtor who requests relief before the

*Throughout brief all emphasis added to quotations

> termination of an extension proposal, or within a reasonable time, or in accordance with any rigid schedule of time. See *Wright v. Logan*, 315 U. S. 139, 141 (1942). A liberal construction of the section makes it applicable to any aggrieved debtor *at any time*. Therefore, in the instant case lapse of time did not deprive the district court of jurisdiction to entertain appellant's amended petition." (TR.-179)

The facts of *Wright* v. *Logan* were not at all similar. There the debtor had failed to procure a voluntary extension under Subsections (a-r), and, therefore, there was no question as to whether the relief of Subsections (a-r) and relief of Subsection (s) are cumulative.

The Circuit Court seeks to justify its conclusion on the ground that at the time the debtors filed their amended petition they still had a justiciable interest in the property. Petitioner does not contend that the debtors did not have the right to be adjudicated *voluntary* bankrupts after the expiration of their extension proposal, but contends that they did not have the legal right to amend their petition under Section 75(s) and procure the benefits of said Subsection, including a three-year stay. A mere reading of the statute in question shows that adjudication under Subsection (s) is not a matter of absolute right, but is dependent upon the existence of one of two alternate situations; first, the farmer must fail to obtain the acceptance of a composition and/or extension proposal, or, second, he must feel aggrieved "*by* the composition and/or extension." In the instant case the farmers procured the acceptance of their extension proposal. The question therefore is whether they had the legal right to be adjudicated bankrupts under the second alternative.

The wording of the statute is that the debtor must "feel aggrieved *by* the composition and/or extension." The Circuit Court held that it was the intention of Congress to permit a farmer to feel aggrieved *by* an extension at any

time during the term of such extension, at the end thereof, or *at any time after* the end thereof. It is respectfully submitted that the Congress merely intended that, should a composition and/or extension become burdensome *before full consummation,* the farmer might abandon the proposed composition and/or extension and amend under Subsection (s). The report of the Committee on the Judiciary and statements made in Congress when the original Section 75(s) was being considered support this contention. House of Representatives Report No. 1898, 73rd Congress, Second Session, contains the following statement from the Committee on the Judiciary:

> "In brief the proposed legislation provides that a farmer, *whose efforts under the present agricultural composition section of the bankruptcy act to secure an adjustment of his indebtedness have failed,* may amend his petition, etc . . ."

In speaking on behalf of the Bill *Representative Jones, (Texas)* said:

> "The real compulsory feature of the bill is to the effect that *if* the lien holder and the owner of the land *cannot agree on a program as set out in the bill* (75-*a-r*), or some other program, *then* the owner of the land has the right to appeal to the bankruptcy court, and under the control of that court, foreclosure is forbidden for a period of five years, on condition that a reasonable rental be paid during that period . . ." (Cong. Rec. V78, Part 11, Page 12131.)

Representative Lloyd, (Washington) said:

> "Under the law as it now exists, the farmer who cannot pay his debts and avails himself of the bankruptcy act must submit to the rules and regulations laid down by the conciliators appointed. These conciliators may, and often do, in the broad discretionary power conferred on them by the law, make *terms and conditions which the farmers cannot meet.* By this act it is our intent and purpose to provide an honest remedy for the creditor and to provide, too, some method by which the honest

farmer . . . may save his home . . ." (Cong. Rec. V78, Part 11, Page 12131.)

Representative Lemke, (North Dakota) co-author, said:

"Therefore I respectfully submit that H.R. 9865 is constitutional, *that in case the debtor and creditor cannot get together and conciliate under Section* 75, it provides an honest and efficient method of scaling down indebtedness . . ." (Cong. Rec. V78, Part 11, Page 12136.)

This Court has had several occasions to refer to the rights of a debtor under the two procedures, although it has not had under consideration the precise question here presented.

In *Louisville Joint Stock Land Bank* v. *Radford,* 295 U. S. 555; 55 S. Ct. 854, Mr. Justice Brandeis said:

"That Act provides, among other things, that a farmer who has *failed* to obtain the consents requisite to a composition under §75 of the Bankruptcy Act, may, upon being adjudged a bankrupt, acquire alternative options in respect to the mortgaged property."

In *Adair* v. *Bank of America,* 303 U. S. 350; 58 S. Ct. 594, Mr. Justice Reed said:

"Upon *failure* of composition and extension, further opportunity for rehabilitation is afforded the debtor, through provisions enabling him to retain possession of his property under conditions favorable to its ultimate redemption by him. These steps are carried out under judicial supervision, subsection (s)."

In *John Hancock Mutual Life Insurance Company* v. *Bartels,* 308 U. S. 180; 60 S. Ct. 221, Mr. Chief Justice Hughes said:

"Subsection s of Section 75 as amended by the Act of August 28, 1935, prescribed a definite course of procedure. That subsection applies explicitly to a case of a farmer who has *failed* to obtain the acceptance of a majority in number and amount of all creditors whose claims are affected by a proposal for a composition or an extension of time to pay his debts . . .

"The plain purpose of Section 75 was to afford relief to such debtors who found themselves in economic distress however severe, by giving them the chance to seek

> an agreement with their creditors, subsections a to r, and, *failing this*, to ask for other relief afforded by subsection s."

In *Harris* v. *Zion Savings Bank and Trust Company*, 317 U. S. 447; 63 S. Ct. 354, Mr. Justice Douglas, in a dissenting opinion in which Mr. Justice Black and Mr. Justice Murphy joined, and in which said Justices contended for a broader interpretation for the benefit of farmer-debtors than was conceded, said:

> "The offer of composition made by the decedent before her death might or might not have been accepted. But even though it was rejected, Subsection (s) affords an *alternative* form of relief, one benefit of which is discharge."

From these decisions it is very evident that this Court has considered Subsection (s) as *alternative* relief rather than as *cumulative* relief.

As indicative of a proper interpretation of the statute, the commentary on the Chandler Act made by George E. Q. Johnson of the Chicago Bar, formerly United States District Judge of the Northern District of Illinois, and author of Johnson's Bankruptcy Reorganizations, is pertinent. This appears on Page xxvi U.S.C.A. Title 12, Bankruptcy Section 201 to End, and reads as follows:

> "If the proposal is not accepted or the extension or composition becomes too burdensome, the debtor may amend his petition and ask for an adjudication."

In fact, in the *Cohan* case the Ninth Circuit Court of Appeals made an almost identical statement, namely, "Congress apparently anticipated that a plan might prove unworkable *upon a trial of it* and therefore provided for an adjudication upon petition of the aggrieved debtor notwithstanding the acceptance and confirmation of his own proposal."

From the Circuit Court's decision in the instant case it seems very evident that the Court interpreted the pertinent

statute as authorizing a debtor to file an amended petition if the debtor *at that time* is aggrieved by *anything*. Apparently the fact that the statute authorizes the filing of such amended petition *only* if the debtor *feels aggrieved by a composition and/or extension* was not considered. It is conceded that these debtors, as well as any other debtors, who, as here, submitted an extension proposal, had the benefiit thereunder—a three-year voluntary extension—, but who, after the expiration of such voluntary extension, had not improved their position, because they had failed to fulfill their part of the extension proposal—in this case the debtors failed to make any payment to petitioner—would certainly still be aggrieved, but not *by the extension*, which had been a *benefit* and not a *burden*. A court could not possibly find any merit to the debtors' contention that *they* are the ones aggrieved *by the extension*.

The Circuit Court apparently believes that there is no duty on the part of a court to consider the *facts* upon which a debtor bases his purported grievances, and apparently interprets the statute as though it read "or if he *says* he is aggrieved by the composition and/or extension." We deem it a duty of the Court to determine whether there is an actual basis for the debtors' statement in their amended petition that they "feel aggrieved by the extension."

The fact is that petitioner and other creditors made the debtors an absolute gift of a three-year voluntary extension, as they did not receive the consideration which was contemplated in the proposal. The debtors did not "feel aggrieved" at any time during the term of the extension, although the creditors certainly did, because they were not receiving the contemplated payments. After the voluntary extension expired, the debtors did not "feel aggrieved" and were content to allow matters to remain in status quo. The creditors permitted this for some time, but then found it necessary to take some action in the bankruptcy court for

the purpose of procuring such relief as a creditor is entitled to after a debtor has effected "a composition and/or extension of time to pay his debts," (Section 75(c), but has failed to make good. Even then the debtors did not "feel aggrieved" and informed petitioner through their attorney that after thoroughly discussing the matter of filing a petition under Subsection (s) they had concluded not to do so and "are willing to let the matter go any way that is satisfactory to you." (TR 166, 167) They evidently did not "feel aggrieved" when, on February 9, 1942, the Conciliation Commissioner made his order in which he found:

> "That the debtors have consented that such relief as was demanded by the secured creditors in said petition, and as may be deemed proper by this court may be granted." (TR 41)

In fact, they did not "feel aggrieved" until about the time petitioner was in a position to have the power of sale exercised in accordance with the Conciliation Commissioner's order. One must be very naive to believe that the debtors felt aggrieved at the gift (extension) given them by their creditors.

A debtor may amend if he feels aggrieved by a composition, as well as by an extension. These debtors, during the depression, might have made petitioner an offer of composition under which the debtors would deed the property to petitioner provided it would agree to a composition whereby the debt would be settled in full and petitioner would pay twenty five cents on the dollar to all other creditors. According to the Circuit Court's interpretation, the debtors would have had the legal right, when farm prices improved several years later, to feel aggrieved by the composition, amend under Section 75(s) and procure the several benefits thereunder. The variance of such a result with all rules of contract emphasizes the fallacy of the Circuit Court's decision. Subsection (k) says "a composition or extension proposal shall be binding on the farmer and" his creditors.

II

The Conciliation Commissioner's Order of February 9, 1942, Granting Petitioner Authority to Foreclose was not Nullified by the Subsequent Adjudication under Subsection (s)

The Circuit Court held that debtor may amend under Subsection (s) so long as he has a justiciable interest in his property, and further said:

> "There is no evidence of actual sale and certainly none of any final passing of title as a result of such a sale."

As shown in the Summary of Facts, the authority to exercise the power of sale under the deeds of trust was granted February 9, 1942. Under the California law a notice of default must be of record for ninety days before such a power of sale may be exercised, and the sale must then be noticed twenty days—a minimum of one hundred ten days. The debtors filed their amended petition on May 19, 1942, just ninety-nine days after the order was made authorizing petitioner to have its power of sale exercised. Naturally there was no evidence of a sale.

Where a debtor *has* the legal right to amend under Subsection (s), he does so in the same proceeding he instituted under Subsections (a-r). Since Subsections (a-s) constitute but one proceeding, an order made by the court, from which there has been no appeal, does not become automatically nullified by a subsequent order which is not contrary thereto. To say that the order of February 9, 1942, was nullified by the adjudication under Subsection (s) because the debtors had a justiciable interest in their property is the same as saying that in a general bankruptcy proceeding, where a secured creditor has been granted leave to foreclose, the order granting such leave is void and becomes nullified as soon as made, because the creditor can not foreclose *instanter*

and the bankrupt has a justiciable interest in the property. The Circuit Court recognized this in its first decision in this case. (147F. (2d) 505.)

III

The Circuit Court erred in reversing the District Judge's finding that there had been a waiver.

The letter from the debtors' attorney (TR 166,167) shows the offer made by the debtors. The offer clearly meant that the Randolph Marketing Company should be compensated from the proceeds of the grapefruit to the extent of the money owed them. The letter from petitioner's attorney (TR 34-36) was not a counter-offer but merely clarified this point. Futhermore, the debtors' offer was to "let the matter go any way that is satisfactory to" petitioner. The so-called "additional conditions" suggested by petitioner's attorney were simply for the purpose of indicating how the matter was to go so as to be satisfactory to petitioner. In any event, *before* the debtors filed their amended petition the Randolph Marketing Company picked the grapefruit and retained the proceeds, the debtors withdrew their opposition to petitioner's petition and consented to the Conciliation Commissioner's findings in his order of February 9, 1942, (TR 41.) and the Conciliation Commissioner made the order. Furthermore, the possession agreement signed by Florence Davis Smith, the record owner, was the very one enclosed in the attorney's letter. The agreement referred to by the Circuit Court of Appeals as the possession agreement which was "different in material respects" was the proposed order which was sent to the debtor's attorney "In order to expedite the matter." (TR 36) Petitioner's attorney did not insist that this form of order be signed.

The Circuit Court also erred in stating that on February 9, 1942, "The commissioner had then concluded the debtors

could amend under Section 75(s) and had ordered appellees' petition dismissed." (TR 182) No such conclusion was made by the Conciliation Commissioner until December 17, 1942, at which time he ordered a subsequent petition dismissed. (TR 45)

Respectfully submitted,

RICHARD W. YOUNG,
Attorney for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 450

THE FEDERAL LAND BANK OF BERKELEY,

Petitioner,

vs.

FLORENCE DAVIS SMITH and HARVEY W. SMITH,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

ALLAN J. CARTER,
First National Building, Pomona, Calif.
Attorney for Respondents.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

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IN THE

Supreme Court of the United States

October Term, 1945.

No. 450

The Federal Land Bank of Berkeley,
Petitioner,

vs.

Florence Davis Smith and Harvey W. Smith,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Opinion Below.

The opinion of the Circuit Court of Appeals for the Ninth Circuit here sought to be reviewed is now reported in 150 Fed. (2d) 318.

ARGUMENT.

I.

Respondent Debtors Had the Legal Right to Be Adjudicated Under (s) Even If the Voluntary Extension Period Had Expired.

Petitioner claims that the original extension agreement under (a) to (r) was limited to three years and "expired" on November 2, 1940. Respondents throughout

this proceeding have asserted the contrary. The Circuit Court of Appeals in its last opinion now under attack held it was unnecessary to pass on this question, Note 1, 150 Fed. (2d) 319. In its earlier opinion the Court had recognized that the agreement was for three years "and thereafter," 147 Fed. 506. The language of the agreement itself showed that it was for more than three years. [Tr. 15.]

Petitioner claims that Commissioner Ginsburg's finding of February 9, 1942, that the extension agreement had expired, not being appealed from, is conclusive. (Petnrs. Pet. & Br., p. 2.) Throughout our briefs in the Circuit Court of Appeals we have insisted that the Order of February 9, 1942, was void as beyond the power of a Commissioner to enter under Subdivision (o) of Section 75. (Op. Br., p. 26; Rep. Br., p. 3.) While subdivision (o) contained the phrase "prior to confirmation," the section has been construed to apply as to later proceedings under Section 75. (*Bastion v. Erickson,* 114 Fed. (2d) 338 at 340; *Schriever v. Oxford Building & Loan Ass'n.,* 116 Fed. (2d) 683 at 684.) This Court when the precise question came before it declined to pass on it as being unnecessary to a decision of the case. *Bernards v. Johnson* (314 U. S. 19, 86 L. Ed. 11, 62 S. Ct. 30.)

The Circuit Court of Appeals in our case, while assuming without deciding, that the extension agreement did expire November 2, 1940, has proceeded to hold that respondents could still feel themselves aggrieved and be adjudicated bankrupts under subsection (s). Both the Conciliation Commissioner and the District Court had reached a similar conclusion. [Tr. 47-48; 65.]

We respectfully submit that the reasoning of the Circuit Court of Appeals of the Ninth Circuit in the case of

Cohan v. Elder, 118 Fed. (2d) 850, in which certiorari was denied by this Court, 313 U. S., 583; 61 S. Ct. 1102; 85 L. Ed. 1539, and that of the Circuit Court of Appeals of the Tenth Circuit in *Brinton v. Federal Land Bank*, 129 Fed. (2d) 740, fully justified this holding of the Circuit Court of Appeals in the instant case.

Petitioner now takes the position that Congress in the language of Subsection (s) that "any farmer * * * if he feels aggrieved by the * * * extension may amend his petition * * * asking to be adjudged a bankrupt," merely intended to cover a burdensome situation arising "before full consummation" (Petnrs. Pet. & Br., p. 7.)

This is not the position petitioner took in the Court below. At page 20 of their main brief in the Circuit Court of Appeals after quoting the relevant portion of subsection (s), counsel for petitioner said:

> "It is not clear whether the debtor may feel aggrieved only *prior to* the confirmation of the composition or extension or whether he may feel aggrieved *during* the period of an extension or *after* the period of an extension. Since the provision is ambiguous * * * the Court is forced to * * * consider the history of the legislation * * *." (Emphasis Petitioner's.)

If the language were ambiguous, that ambiguity should be resolved in favor of the debtor, *Wright v. Union Central Life Insurance Company*, 304 U. S. 502, 58 S. Ct. 1025, 82 L. Ed. 1490; *Wright v. Union Central Life Insurance Company*, 311 U. S. 273, 61 S. Ct. 196, 85 L. Ed. 184.

But the language is not ambiguous; it is merely broad enough to cover any dissatisfaction by the debtor at any

time. *Cohan v. Elder,* 118 Fed. (2d) 850; *Wright v. Logan,* 315 U. S. 139; 62 S. Ct. 508, 86 L. Ed. 745. Because there is no ambiguity, resort to the history of the legislation while under consideration by Congress is improper.

Nearly all of the arguments now advanced by petitioner as grounds for holding that the right to go under (s) had expired were presented to this Court in the Petition and Brief for Certiorari in the case of *Cohan v. Elder,* 313 U. S. 583, 61 S. Ct. 1102, 85 L. Ed. 1539, and were rejected by this Court by the denial of that petition. Present counsel for respondents, represented the farm-debtors, Mr. and Mrs. Elder, in that case. While the three-year extension period there involved had not expired, it had less than three months still to run and counsel for petitioner Cohan presented at length the argument that the farm-debtors could not have been aggrieved by the extension which had been a benefit and not a burden to them. (For similar argument here see Pet. Br., pp. 10-11.)

This Court in its Opinion in *Wright v. Logan, supra,* stated as the first ground why Certiorari was granted in that case, the asserted conflict of the Circuit Court of Appeals decision in that *Wright* case with the decision of the Circuit Court of Appeals in *Cohan v. Elder, supra.* This Court in the *Wright* case, *supra,* reiterated its holdings that Section 75 must be liberally construed and that therefore "farmers cannot be deprived of the benefits of the Act because a Court may believe that they have received the equivalent of what it prescribes." (86 L. Ed. 749.)

The decision chiefly relied on by the Circuit Court of Appeals in deciding the present case is that of *Brinton v. Federal Land Bank of Berkeley,* 129 Fed. (2d) 740. That decision had also been the basis for Judge Beaumont's holding against petitioner on this point in his Memorandum Opinion [Tr. 65]. In that case the District Court after the debtor had failed for more than three years to even present any offer of composition or extension, had authorized the mortgagee, which happened to be the petitioner in the present case, to foreclose its mortgages in the State Court. Three months later and after petitioner had started foreclosure proceedings, the debtor in that case amended his Petition and was adjudged a bankrupt under subsection (s). The Circuit Court of Appeals of the Tenth Circuit held that the Order of Adjudication under (s) cut off petitioner's right to proceed with the foreclosure. The Circuit Court of Appeals said, page 743:

> "Our question then is narrowed to the query of whether a final order of discharge or dismissal under Section 75, Subs. a-r, is a bar to a subsequent proceedings by amendment under Section 75, Sub. s."

The Federal Land Bank of Berkeley in the *Brinton* case, argued, as they do here, that the earlier Order of the District Court permitting foreclosure had not been affected by the adjudication under (s). Nevertheless, the Circuit Court of Appeals held to the contrary, saying in part, page 744:

> "The right to invoke the remedial provisions under Section 75, sub. s, is conditioned only on a failure or a grievance under Section 75, subs. a-r, 'and a previous discharge of the debtor under any other section of this title shall not be grounds for deny-

> ing him the benefits of this section.' Section 75, sub. s (5). See *Cohan v. Elder, supra.* If the finality of orders made by the court under subsections a-r shall be made to control the jurisdiction under subsection s, the Congressional intent and purpose of Section 75, sub. s, would be greatly circumvented, if not wholly obscured."

While the Circuit Court of Appeals in the *Brinton* case proceeded to rule in favor of petitioner on another point so that it was the farmer-debtor in that case who sought and was denied Certiorari by this Court (317 U. S. 694, 63 S. Ct. 435, 87 L. Ed. 556), nevertheless the holding that the right of the mortgagee to proceed with foreclosure, was cut off by the adjudication under (s) has stood unchallenged. Nor do we know of any decision to the contrary.

If the rights of the farm-debtor to go under (s) could not be cut off by any prolonged and careless failure to act, as held by this Court in *Wright v. Logan, supra,* and *Brinton v. Federal Land Bank, supra,* how much more appealing are the equities of the farm-debtors in the present case. The record here contains actual evidence and extensive offers of proof on the part of respondents that negotiations were going on almost continuously between the parties throughout a period commencing long prior to November 2, 1940, and continuing up to the actual filing under (s), looking to an amicable settlement whereby respondents could have been protected without having to petition for relief under subsection (s). [Tr. 141-145, 154-155, 159.] This evidence has not been denied anywhere else in the record. Moreover petitioner waited from November 2, 1940, to February 18, 1941, before filing a petition for leave to foreclose [Tr. 99] and did

not obtain an order from the Commissioner granting such leave until February 9, 1942, nearly a year later [Tr. 39]. This shows a real lack of diligence on the part of petitioner.

When efforts at a negotiated settlement failed and petitioner gave notice of foreclosure, respondents amended their petition and were adjudicated bankrupts under (s). Petitioner makes a point (p. 12) that respondents waited 99 days after the order permitting foreclosure before filing their amended petition under (s). This delay was caused in part by three changes of respondents' attorneys within a three-year period because the two earlier ones were called into service in the United States Armed Forces [Tr. 63]. We know Mr. Stone was their attorney in March, 1941 [Tr. 166-167]; Mr. Shirley was the attorney in September, 1942 [Tr. 118]; and Mr. McCormick in May, 1943 [Tr. 64]; present counsel being substituted in October, 1943 [Tr. 79].

At the hearing before Commissioner Ginsburg on September 3, 1943, respondents offered to redeem at the appraised value, but the Commissioner ruled that the appraisal had not been fixed [Tr. 163-164]. The record does not disclose what that appraisal value was, but the actual appraisal dated August 4, 1942, is on file in the Commissioner's office and fixed the value of the grove at $5,000.00 and the rental at $500 a year. This fact was called to the attention of the Circuit Court of Appeals in respondent's petition for rehearing with the suggestion, that if necessary, the Court should send for a certified copy of that appraisal from the Commissioner. (Resp. Pet. for Rehearing, p. 15.) The Circuit Court of Appeals has accepted the fact in its opinion, 150 Fed. (2d) 320, note 2. This appraisal was approved by the

three-year stay and rental order of November 2, 1942 [Tr. 99-101; Cir. Ct. of App. Op., note 2, 150 Fed. (2d) 320]. All rental payments called for by said order of November 2, 1942, have been paid.

Throughout the subsequent hearings in the Circuit Court of Appeals, respondents have repeatedly renewed their offer to redeem at this appraised value and on August 23, 1945, prior to the filing of the Petition for Certiorari in this Court, respondents paid $5000 cash into Court for such redemption, by delivering that sum to the Conciliation Commissioner. Respondents further stand ready to redeem their home at any higher figure which may be set by the reappraisal which has been requested by petitioner and two other creditors since said $5000.00 payment was made.

II.

The Conciliation Commissioner's Order of February 9, 1942, Granting Authority to Foreclose, Was Nullified by the Subsequent Adjudication Under Subsection (s).

Petitioner concedes (Pet. Br. p. 12) that no sale had taken place prior to the filing of the amended petition under (s) by the respondents on May 19, 1942. Petitioner argues (p. 12), that "subsection (a) to (s) constitute but one proceeding," so that an order made under (a) to (r) is not "nullified by a subsequent order" under (s).

We do not agree with this conclusion. As pointed out in the case of *Klevmoen v. Farm Credit Administration*, 138 Fed. (2d) 608, at 611, the object as well as the procedure in farm debtor cases is entirely different from that in ordinary bankruptcy. Therefore, since the act of

going under (s) is most nearly similar to ordinary bankruptcy proceedings, the holding of the Circuit Court of Appeals of the Tenth Circuit in the *Brinton* case and the similar holding of the Circuit Court of Appeals of the Ninth Circuit in their decision of this case that the Order to foreclose does not operate, "as a bar to subsequent jurisdiction over the same property under subsection (s) * * * if the debtor has a justiciable interest in the property," was fully justified.

III.

The Circuit Court of Appeals Was Correct in Reversing the District Judge's Finding That There Had Been a Waiver.

Petitioner insists (p. 13) that the exchange of letters between the then attorney for respondents and petitioner's attorney, constituted a waiver. [Tr. 166-167; 34-36.] The contrary holding of the Circuit Court of Appeals, is sustained by an examination of the two documents. While Mr. Stone, then attorney for respondents, in his letter of March 21, 1941, did say that respondents had concluded to abandon the property if the Randolph Marketing Company would be protected as to the grapefruit then on the trees, Mr. Andrews, agent of the Federal Land Bank [Tr. 139], wrote across the bottom of that letter that the consent would only be up to the outlay of the Randolph Marketing Company "if the Smiths will request dismissal of proceedings" [Tr. 167]. Mr. Hoffman in his reply for the Land Bank of March 26, 1941, attached those two conditions and others which admittedly were never met by the parties. [Tr. 35-36.]

Counsel for petitioner assert (p. 13) that "the possession agreement signed by Florence Davis Smith, the

record owner, was the very one enclosed in the attorney's letter" (meaning Mr. Hoffmann's letter of March 26, 1941, just referred to). The Circuit Court of Appeals properly held that this was not the fact, 150 Fed. (2d) 322. Mrs. Smith testified that the Agreement enclosed with Mr. Hoffmann's letter of March 26, 1941, contained a phrase admitting that respondents had had a fair trial under (a) to (r) and were willing to voluntarily ask the Commissioner to dismiss the case; that she refused to sign this and that later in May, 1941, Mr. Andrews accompanied by Mr. Hoffmann brought another agreement which omitted that objectionable part and which was the one that she did sign [Tr. 141-142].

Petitioner asserts (bottom of page 13) that the Circuit Court of Appeals were in error, "in stating that on February 9, 1942, 'The Commissioner had then concluded that debtors could amend under Section 75(s) and had ordered appellees' petition dismissed.' [Tr. 182.]"

On examining the whole paragraph of the Circuit Court of Appeals Opinion from which the above sentence is quoted, (150 Fed. (2d) 321-322) it is apparent that the Circuit Court of Appeals was referring to the Order of December 17, 1942, and not to the Order of February 9, 1942.

The Circuit Court of Appeals in our case was justified in holding that the consent referred to in the Order of February 9, 1942, had no effect on the adjudication under (s), for the reasons stated by the Court itself (150 Fed. (2d) 322) as well as those stated by District Judge Beaumont [Tr. 65] and on the further grounds stated by us under point I, *supra*.

We respectfully submit that this Court should deny petitioner's application for certiorari. Thus the adjudication under (s) would stand, and respondents would be permitted to save their grove by paying into Court whatever additional sum may be necessary in addition to the $5,000 already paid in. They would then take back their grove and home free and clear of all debts and liabilities, which is the very heart and essence of the purpose of Section 75 of the Bankruptcy Act, as has been repeatedly held by this Court.

Dated: October 16, 1945.

Respectfully submitted,

ALLAN J. CARTER,
Attorney for Respondents.

Service of the within and receipt of a copy thereof is hereby admitted this.....day of October, A. D. 1945.

10-16-45—60